IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO. 205 OF 2004

Bombay Railway Engineering Company,]
a partnership firm, having its office situate]
at 14-B/4, Jethibhen Colony, Mori Road,]
Mahim, Mumbai 400 015] ...Applicants

Versus

The Trustees of Port of Bombay,]
through the Chairman and]
Senior Executive Engineer, GWND,]
having its office situate at]
Shoorji Vallabhdas Marg, Ballard Estate,]
Mumbai 400 038.] ...Respondents

Mr. H.S. Dandekar for the Applicants

Mr. E.P. Bharucha, Senior Advocate, with Ms. Kahsmira Bharucha instructed by M/s. Mulla & Mulla & Craigie Blunt & Caroe for the Respondents.

CORAM: **DALVEER BHANDARI, C.J.**

DATE: **SEPTEMBER 2, 2005**

JUDGMENT

1. The brief facts, which are necessary to dispose of this application are recapitulated as under:-

2. The applicants are the contractors and had undertaken various contract jobs. The respondents are the trustees of a registered charitable trust, and awarded work contract to the applicants for construction of Storm Water Drain at Sewree, Mumbai, on 25th November, 1993.

3. On 23rd December, 1993, formal Agreement No. E.72 of 1993 was executed between the parties, *inter alia,* stating therein special conditions applicable to the said contract. Clause (44) of the Special Conditions of Contract reads as under:-

> "If any disputes or differences of any kind other than those involving an amount of less than Rs.10,000/- and also those regarding quality of materials, workmanship, tests and effects during execution in respect of which the Chief Engineer's decision shall be final and binding on the Contractor, shall arise between the Bombay Port Trust and the Contractor in connection with or arising out of the contract or its construction or carrying out of the works (whether during the progress of the work or after their completion and whether before or after the determination, abandonment or which of the contract) it shall be referred to the sole arbitration of an Arbitrator appointed by the Chairman B.P.T. from among serving Engineering Officers of the B.P.T. and not connected with the works under the Contract."

According to the aforementioned clause, the dispute has to be referred to the arbitrator appointed by the Chairman, Bombay Port Trust.

4. It is also mentioned in the application that the applicants, by letters dated 19th December, 1995 and 17th June, 1997, called upon the respondents to appoint the Arbitrator, but the respondents failed and neglected to do so.

5. Aggrieved by the conduct of the respondents, the applicants, through their Advocate's letter dated 30th March, 2001, called upon the respondents to appoint the Arbitrator, failing which the applicants would adopt appropriate proceedings for the appointment of the Arbitrator. It is incorporated in the petition that upon the receipt of the said letter, the respondents, by their letter dated 10th May, 2001, informed the applicants that the request for the appointment of the Arbitrator is being examined and the outcome would be informed in due course. Ultimately, the respondents, by their letter dated 23rd May, 2003, rejected the request of the applicants for the appointment of the Arbitrator, *inter alia,* stating that since the claims of the applicants are 6 and a half years' old, the claims, being barred by limitation, have to be rejected.

6. According to the applicants, the demand for the appointment of the Arbitrator was rejected by the respondents on or about

23rd May, 2003, therefore the present application is within time and have prayed to this Court that the sole Arbitrator be appointed for adjudicating the claims of the applicants and publish the Award as per the provisions of the Arbitration and Conciliation Act, 1996.

7. I have heard the learned counsel for the parties. According to the learned counsel for the applicants, the application for the appointment of the sole Arbitrator by the applicants is within limitation, because on 23rd May, 2003, the respondents had rejected the applicants' request for the appointment of the sole Arbitrator. Hence, the application for the appointment of the Arbitrator is within limitation.

8. According to the respondent, the application could have been filed within a period of three years from the date when the cause of action for arbitration has arisen and that the cause for arbitration can be said to have arisen from the date the party serves a notice upon the other party requiring the appointment of an arbitrator for settlement of the dispute between the parties. This legal position clearly emerges from judgment of the Supreme Court in the case of *Gopal Bose* v. *Board of Trustees for Port of Calcutta*, reported in AIR 1994 SC 1615. The Apex Court held that cause of arbitration shall be deemed to have arisen when one party serves the notice on the other party requiring the appointment of an arbitrator. Applying the law laid down by the Apex Court in the instant

case leads to the conclusion that the present application is barred by limitation.

9. In the instant case, letters dated 19th December, 1995 and 17th June, 1995 called upon the respondents to appoint an arbitrator, but the respondents failed and neglected to do so. The applicants filed Arbitration Application in 2004, which is clearly barred by limitation. Consequently, application filed by the applicants is accordingly dismissed.

CHIEF JUSTICE